GHULAM MOHAMMED SAYEED & ORS.

v.

PERWIRA HABIB BANK (M) BHD. & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[CIVIL SUIT NO. D4-22-206-88]
19 DECEMBER 1988

CIVIL PROCEDURE: *Interlocutory injunction - Application for extension of time to set aside order - Order containing limitation on the defendants to set aside order within 14 days from the date of order - Order not prayed for - Whether Court has jurisdiction to expunge this part of the order - "Liberty to apply" - whether it has any legal effect.*

ELECTION: *Allegation that doctrine of election applied - Whether justified on the facts.*

The plaintiffs applied for and obtained an interlocutory injunction against the second, third and fourth defendants from acting as the receivers and managers of the sixth defendants. The Judge approved a draft order at the hearing of the interlocutory injunction which contained a limitation that the defendants be at liberty to apply to set aside this order within 14 days from the date of the order. This was not prayed for by the plaintiffs in their summons in chambers.

The first defendant applied for an extension of time to set aside the order and further prayed for an order that the interlocutory injunction be set aside. At the hearing of this application Counsel for the plaintiffs raised a preliminary objection in that the first defendant was not entitled to proceed with their application on the grounds of their delay in filing the application after the lapse of 14 days period and that the first defendant was estopped from filing its application on the basis that the first defendant had obtained a *Mareva* injunction against the plaintiff in a separate suit.

Held:

[1] That the Court had an inherent jurisdiction to order that the last part of the order which limited the application to set aside the order to 14 days from the date of the order be expunged on the ground that it was not prayed for and the Judge did not make such an order.

[2] That it was irrelevant and incorrect to add the words "liberty to apply" as the right is inherent in any event.

[3] That the last part of the order limiting time in which the first defendant could apply to set aside the order was not a peremptory order to be obeyed by them.

[4] That the Rules of the High Court does not stipulate a time within which a party had to apply to set aside the injunction and the party could do so at any time before judgment in the action.

[5] That on the facts of the case the doctrine of election did not apply and the first defendant was not estopped from filing the present action.

[Preliminary objection dismissed with costs.]

Cases referred to:
Thynne v. Thynne [1955] P 272
William Lawrie v. George Lees [1881] 7 AC 19

Lim Kit Siang v. United Engineers (M) Bhd. & 3 Ors. [1981] WLR 13
Janov v. Morris [1981] WLR 13
Hitachi Saabs (UK) Ltd. v. Mitsui OSK Lines [1986] 2 Lloyd's LR 576
Permodalan MBF Sdn. Bhd. v. Tan Sri Datuk Seri Hamzah bin Abu Samah & Ors. [1988] 1 CLJ (Rep) 244
Meng Leong Development Pte. Ltd. v. Jip Hong Trading Co. Pte. Ltd [1985] 1 MLJ 7

Legislation referred to:
Rules of the High Court 1980, O. 32 r. 6

Other sources referred to:
Supreme Court Practice 1988 Vol 1 pp 362, 533 & 611
Halsbury's Laws of England, 4th Edn. Vol. 45 p. 533

For the plaintiffs - Sri Ram; M/s. Sri Ram Zulkifly & Kumar, & Joseph Yeo & Jaya Mahesan; M/s. Jeya Mahesan & Co.
For the first defendant - D.P. Naban (Aznam bin Mansor with him); M/s. Skrine & Co.
For the 2nd, 3rd, 4th and 5th defendants - Robert Lazar; M/s Shearn & Delamore

JUDGMENT

Zakaria Yatim J:

This is an application by the first defendant for an order that (a) time be extended further to that allowed by the order granted *ex parte* on 29 September 1988 (hereinafter referred to as "*ex parte* order") to enable the first defendant to make this application; (b) the injunction and related orders granted on 29 September 1988 be set aside (c) an enquiry be held as to the damages the defendants have suffered as a result of the said order; (d) the costs of an incidental to this application and/or damages assessed to have been suffered by the defendants be paid by the plaintiffs to the defendants in any event; and the writ of summons filed by the plaintiffs be set aside.

At the commencement of the hearing of the application, Mr. Sri Ram, Counsel for the plaintiffs raised a preliminary objection. He submitted that the first defendant was not entitled to proceed with the present application. He was relying on the last part of the *ex parte* order which states:

> **And it is ordered** that upon the writ of summons, summons-in-chambers and affidavit-in-support being served on the defendants, they be at liberty to apply to set aside or vary this order within two (2) weeks from the date thereof.

According to him, the present application should have been filed on or before 14 October 1988. He said that the application was filed only on 25 October 1988, and there was a delay of eleven days in filing the application.

He further submitted that the first defendant, instead of filing the present application within the time prescribed in the last part of the *ex parte* order, filed another application on 4 October 1988 for an injunction to restrain the plaintiffs from selling the land and goods belonging to the sixth defendant. He said that the first defendant also obtained a Mareva injunction on 28 October 1988 before V.C. George J *vide* CS C23-202-1986. He argued that the first defendant had elected to follow the alternative courses instead of filing the present application within the prescribed time and according to him, the first defendant was estopped from proceeding with the present application.

Mr. D.P. Naban, Counsel for the first defendant, submitted that the first defendant has the inherent right to apply to set aside an order made *ex parte*. He said that the words "liberty to apply" as contained in the last part of the *ex parte* order has no relevance to an application to set aside an interim injunction or to vary an order. He urged the Court to expunge the last part of the *ex parte* order.

In considering the preliminary objection raised by Mr. Sri Ram, it is necessary to examine the sequence of events that led to the granting of the *ex parte* order in question. On 29 September 1988, the plaintiffs filed the writ of summons in this action.

On the same date the first and second plaintiffs filed their application by summons-in-chambers on a certificate of urgency. The application was supported by the affidavit of the first plaintiff affirmed on 23 September 1988 and the affidavit of Mr. V. C. Kumar, an advocate and solicitor in the firm of solicitors acting for the plaintiffs, affirmed on the same date.

The application contained a number of prayers: Prayer (a) was to restrain the second, third and fourth defendants from acting as receivers and managers of the sixth defendant, Shiraz Hotel and Restaurant Sdn. Bhd. (Shiraz). Prayer (b) asked for an order to restrain the first defendant from appointing any other person or persons from acting as receivers and managers of Shiraz. Prayer (c) asked for the accounts relating to the affairs of Shiraz, and for a report of the activities of second, third and fourth defendants. The same prayer asked for an order that the first, second, third and fourth defendants deliver to the first and second plaintiffs all account books, documents and all other moveable or immovable properties belonging to Shiraz. Prayer (d) asked that the cost be in the cause and prayer (e) asked for further or other relief as might be just and equitable. The application did not contain any prayer for an order quoted above. The affidavit of the first plaintiff merely prayed for an order in terms of the application.

On the same day I heard the application *ex parte* in view of the certificate of urgency. After hearing Mr. Sri Ram, who represented the plaintiffs, I made an order in terms of prayers (a), (b), (c) and (d) subject to the usual undertaking as to damages. The same order was later transcribed into the minute sheet of the file by the Senior Assistant Registrar. At the end of the *ex parte* application, after I had made the order, Mr. Sri Ram showed me a draft order for approval. After looking at the draft order I approved it. When I approved the draft order I completely overlooked the last part of the order, which is now being relied upon by the plaintiff in raising the preliminary objection. The last part of the *ex parte* order was not in one of the prayers in the summons-in-chambers and I did not make such an order after hearing Mr. Sri Ram. I should add here that I did not make any order in respect of prayer (d), which is for further or other relief.

In my opinion, although the *ex parte* order has been signed by the Senior Assistant Registrar, this Court has the inherent jurisdiction to order that the last part of the *ex parte* order be expunged on the ground that it was not prayed for and I did not make such order after hearing the *ex parte* application. Clearly there was an error in this case. The Court has the power under its inherent jurisdiction to vary, modify or extend its own order so as to ensure the purposes of justice and correctly to express the intention of the Court's order. *Thynne v. Thynne* [1955] P 272. In *William Lawrie v. George Lees* [1881] 7 AC 19, Lord Penzance, in his judgment in the House of Lords, said,:

> I cannot doubt that under the original powers of the Court ... every Court has the power to vary its own orders which are drawn up mechanically in the registry ... To vary them in such a way as to carry out its own meaning ... I think that power is inherent in every Court.

a See also the *Supreme Court Practice* [1988] *supra*, p. 362.

I should add that it was irrelevant and incorrect to insert the words "liberty to apply " in the order. In *Stephen v. Stephen* [1931] p. 197 at 203 & 204, Lord Hanworth MR, in his judgment said,

> When the matter came before the President the question which arose was whether the words
> *b* 'liberty to apply' which had been inserted in the registrar's order ought to be expunged. The President directed that those words should be deleted from the order, and it appears to us that he was right in so doing ..., But where a party has a right to apply to the Court that right is not lost or diminished by the failure to add the words 'liberty to apply' which only refer to procedure ... I agree with the President that the words 'liberty to apply' in the registrar's order are irrelevent and incorrect, ...

c Although the facts in *Stephen v. Stephen* [1931] p. 197 at 203 & 204 are different from the facts of the present case, in my view the passage quoted above is applicable to the present case. See *Lim Kit Siang v. United Engineers (M) Bhd. & 3 Ors. (No. 2)* [1981] WLR 13 & 9, where V.C. George J rightly said:

> The liberty to apply to set aside (or vary) an *ex parte* order being inherent, there is no need for any specific provision to be incorporated in the order giving such liberty...

d Mr. Sri Ram further submitted that the last part of the *ex parte* order is a peremptory order which should be obeyed by the first defendant. In support of his submission he relied on the decision of the English Court of Appeal in *Janov v. Morris* [1981] WLR 13 & 9. In that case the plaintiff issued a writ claiming against the defendant damages for breach of contract. The defendant delivered his defence and counter-claim and then no further step was taken in the action for a period of ten months. On the application of the defendant, the Master *e* ordered that the action would be struck out unless the plaintiff served his summons for directions by a specified date. The plaintiff failed to comply with the order or to offer any explanation for his delay in presenting the action. The Master then gave judgment on the counter-claim for the defendant. The plaintiff issued a second writ pleading the same cause of action. The defendant successfully applied to strike out the second action on the ground that it was an abuse of the process of the Court. The Court of Appeal held that the Court *f* had a discretion to strike out an action where there had been failure by a litigant to comply with a peremptory order of the Court in the previous action. It was also held that peremptory orders were made to be complied with and not to be ignored and, in the absence of any explanation for the plaintiff's conduct, the Court, in the exercise of its discretion would order that the action be struck out.

g In my view the last part of the *ex parte* order in the present case is not a peremptory order. A peremptory order is an order by which a person is required to do something within a fixed time or suffer the consequences. *Halsbury's Law of England*, 4th Edn. Vol. 45, p. 533. *Janov v. Morris* is a good example of peremptory order. A peremptory order must be made in compliance with the Rules of the High Court or under any other rules. See the *Supreme Court Practice* 1988, Vol. 1, p. 18 See also *Hitachi Saabs (UK) Ltd. v. Mitsui OSK Lines* *h* [1986] 2 Lloyds LR 576 at 575.

Both Mr. Sri Ram and Mr. Naban agreed that there is no requirement of law that the last part of the order be included in the *ex parte* order. Mr. Sri Ram however referred to Form 58 of the Rules of the High Court 1980. The Form states *inter alia*, the returnable date or until further order. The words "until further order" clearly do not mean that time must be specified

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for the defendant to apply to set aside the injunction. I agree with both Counsel that the last part of the *ex parte* order quoted above was not made pursuant to any law or the Rules of the High Court.

In the circumstances, I order that the last part of the *ex parte* order be expunged.

Since the last part of the *ex parte* order has been expunged the application for extension of time as contained in prayer (a) no longer arises. However it is necessary to consider whether the question of delay is still a relevant issue. The application was filed on 25 October 1988. The *ex parte* order was served on the solicitors for the first defendant on 30 September 1988. In other words the application was filed by the first defendant twenty-five days from the date of *ex parte* order was served on the first defendant. Mr. Sri Ram Submitted that there should not be delay in applying to dissolve an injunction. One of the authorities cited by him is *Janov v. Morris, supra*. As already stated, that case dealt with the question of failure to comply with a peremptory order. Duncan LJ in that case said that the Court had the discretion to consider the explanation for non-compliance with the peremptory order and also the explanation for the ten months delay. In that case the plaintiff did not give any explanation at all.

In the instant case the question of peremptory order does not arise. However as in *Janov v. Morris, supra.*, the Court has the power to exercise its discretion whether there is inordinate delay in the present case. The Rules of the High Court do not stipulate the time limit for a defendant to apply to set aside an injunction. Order 32 r. 6 merely provides that the Court may set aside an order made *ex parte*. In *Permodalan MBF Sdn. Bhd. v. Tan Sri Datuk Seri Hamzah bin Abu Samah & Ors.*, [1988] 1 CLJ (Rep) 244 the Supreme Court said that:

> The Court should be prompt in exercising its discretionary power to set aside an *ex parte* order under O. 32 r. 6 RHC. Delay would defeat the real purpose of the rule.

I think the passage quoted above clearly states that it is the Court which must act promptly and there must not be a delay in hearing an application to set aside an *ex parte* order. It is also implicit in the judgment of the Supreme Court that the *inter parte* hearing should be heard until the trial of the action.

In my opinion a party may apply to dissolve an interlocutory injunction at any time before judgment in the action, and an interim order may be discharged at any time before the day named. See *Halsbury's Laws of England*, 4th Edn., Vol. 24, p. 611. In the present case the *ex parte* order does not contain any returnable date and the first defendant is therefore at liberty to apply to set aside the injunction any time before the trial of the action. In my view a delay of twenty five days is not an inordinate delay. Furthermore, the first defendant has given a reasonable explanation for the delay. In a letter written by the solicitors for the first defendant to the solicitors for the plaintiffs on 25 October 1988, it is stated,

> We apologise for the delay in the making of this application but this is due to the fact that certain changes have to be made to the affidavit in support.

The affidavit in support contains twenty-three paragraphs and sixty pages of documents exhibited to it. I am satisfied with the explanation and I do not think that there is inordinate delay in filing the application to set aside the injunction in the circumstances of the present case.

The next question to consider is whether the doctrine of election applies in the present case. Mr. Sri Ram submitted that the first defendant had, by its conduct, represented to the plaintiff that it did not propose to set aside the injunction granted on 29 September 1988. According

to him the first defendant had elected to follow one alternative course viz. to file and proceed with an application for an injunction against the plaintiffs. He added that the first defendant had conducted himself in such a way as to convey the impression that he proposed to proceed with one or two mutually exclusive courses of action open to him. According to him the first defendant was estopped from changing his course of action to the detriment of the plaintiff. Mr. Naban, on the other hand submitted that the doctrine of election did not apply in the present case.

In considering the question of election, it is necessary to ascertain what is the doctrine of election. In *Meng Leong Development Pte Ltd. v. Jip Hong Trading Co. Pte. Ltd.* [1985] 1 MLJ 7 at 11, the Privy Council quoted a passage from *Spencer Bower & Turner, "The law relating to Estoppel by Representation"*, 3rd Edn. which summarises the doctrine as applied to the law of estoppel in the following words.

> Where A, dealing with B, is confronted with two alternative and mutually exclusive courses of action in relation to such dealing, between which he may make his election, and A so conducts himself as reasonably to induce B to believe that he is intending definitely to adopt the one course, and definitely to reject or relinquish the other, and B in such belief alters his position to his detriment, A is precluded, as against B, from afterwards resorting to the course which he has thus deliberately declared his intention of rejecting. It is of the essence of election that the party electing shall be "confronted" with two mutually exclusive courses of action between which he must, in fairness to the other party, make his choice.

In the present case, the first defendant, besides filing the present application, also filed an application for injunction against the plaintiffs on 4 October 1988. To date that application has not been heard. The first defendant has also obtained a *Mareva* injunction on 28 October 1988 before V.C. George J *vide* CSC. 23-202-1986. In the present action the first defendant has two alternative courses of action that is the present application and the application for an injunction against the plaintiffs. Although the application for injunction was filed earlier than the present application, the solicitors for the first defendant had informed the solicitors for the plaintiffs that the first defendant would proceed with the present application and the solicitors for the plaintiffs were aware of this. In their letter to the solicitors for the plaintiff dated 3 October 1988, the solicitors for the first defendant stated *inter alia*:

> Please also be informed that this letter is without prejudice to any of our clients' right including the setting aside of the said order.

This letter is exhibited to the affidavit of the first defendant which was filed in support of the application for injunction against the plaintiff. In another letter to the solicitors for the plaintiffs dated 27 October 1988, the solicitors for the second defendant wrote:

> In respect of this application, we make reference to the conversation between Encik Shahul Amiruddin who appeared on behalf of your clients on 12 October 1988 wherein our Mr. D.P. Naban indicated that we would be filing the application to set aside the injunction and steps would be taken for this application to be heard on 14 and 15 November 1988. Accordingly, we have now taken steps to have this application fixed for hearing on 14 and 15 November 1988 and we now give you notice of the same.

The first plaintiff in his affidavit affirmed on 15 November 1988 acknowledged that he was under the impression that the first defendant would file the present application to set aside the injunction. Paragraph 5 of his affidavit sates:

I am informed by Mr. Shahul Amiruddin who appeared as Counsel on 12 October 1988 and he confirmed that the conversation with Mr. D.P. Naban took place as stated. I am further informed by Mr. Shahul Amiruddin that he gained the impression that the first defendant will file its application to set aside within the time limited by the order dated 29 September 1988 (encl. 6) as Mr. D.P. Naban did not request for an extension of time nor did he indicate that he will seek an extension of time.

From the evidence it is clear that from 4 October 1988 the solicitors for the defendants had consistently informed the solicitors for the plaintiffs that the first defendant would proceed with the application to set aside the *ex parte* order. There is no evidence that the first defendant wanted to relinquish the present application. There is also no evidence that the first defendant has so conducted himself as to induce the plaintiff that the first defendant was intending definitely to proceed with the application for injunction only. In the circumstances, the doctrine of election does not apply in the present case and accordingly the question of estoppel does not arise.

I therefore dismiss the preliminary objection with costs.

Also found at [1989] 1 CLJ 928